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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

WALKER RIVER PAIUTE TRIBE,

vs.

WALKER RIVER IRRIGATION
DISTRICT, a corporation, *et al.*

Defendants.

Case No. 3:73-cv-00127 MMD-WGC

**NEVADA DEPARTMENT
OF WILDLIFE'S,
ANSWER TO
AMENDED COUNTERCLAIM**

Counterdefendant, State of Nevada, *ex rel.*, its Nevada Department of Wildlife (“NDOW”) hereby answers the Amended Counterclaim of the United States of America for Water Rights Asserted on Behalf of the Walker River Paiute Indian Tribe filed herein on May 3, 2019 (the “Second Amended Counterclaim”) as follows:

I. INTRODUCTION

1. This Answer is made subject to the provisions of the Stipulated Scheduling Order and Discovery Plan dated March 7, 2019 (ECF No. 2437) which provides that only answers and affirmative defenses are allowed, and which provides that no counterclaims are required or permitted. In addition, no party is to respond to any allegation contained in the United States’ First Amended Counterclaim (ECF No. 59) at pages 13–31, paragraphs 20–73. The allegations contained in paragraph 1 of the Second Amended

Counterclaim consist of legal conclusions that do not require a response. To the extent that a response is required, NDOW denies them.

II. JURISDICTION

2. NDOW admits that this Court retains continuing jurisdiction of the Court over the waters of the Walker River and its tributaries in California and Nevada under the Final Decree. The remaining allegations contained in paragraph 2 of the Second Amended Counterclaim consist of legal conclusions that do not require a response. To the extent that a response is required, NDOW denies them.

III. PARTIES

3. On information and belief, NDOW admits the allegations contained in paragraph 3.

4. NDOW admits that it is a claimant to the surface water of the Walker River and its tributaries and also to groundwater. NDOW is without sufficient information to admit or deny the remaining allegations of paragraph 4, and on that basis, denies them.

IV. GENERAL ALLEGATIONS

5. NDOW admits that the final judgment entered in *United States of America v. Walker River Irrigation District, et al.*, In Equity No. C-125 (D. Nev.) on April 14, 1936, as amended on April 24, 1940 (the “Decree”), includes a right for the United States of America. The Decree is the best evidence of its provisions, and speaks for itself. NDOW denies that the allegations in paragraph 5 of the Second Amended Counterclaim correctly describe those provisions, and on that basis, denies them.

6. NDOW admits that the United States commenced this case in 1924. The remaining allegations contained in paragraph 6 of the Second Amended Counterclaim consist of legal conclusions that do not require a response. To the extent a response is required, NDOW denies them.

7. NDOW admits that the Decree was amended on April 24, 1940, and affirmatively alleges the Decree, as amended, is the best evidence of its provisions, and speaks for itself. NDOW admits that paragraph XIV of the Decree includes provisions

1 pursuant to which the Court retained jurisdiction of the “cause.” The Decree, as
2 amended, is the best evidence of, and speaks for itself with respect to the content of its
3 paragraph XIV. NDOW denies that the United States is entitled to additional water
4 rights in the Walker River.

5 8. Based on information and belief, NDOW admits that since April 14, 1936,
6 persons and entities may have appropriated water from sources within the Walker River
7 Basin pursuant to and consistent with the laws of the State of Nevada and the State of
8 California. The remaining allegations of paragraph 8 consist of legal conclusions, and do
9 not require a response. To the extent a response is required, NDOW denies them.

10 **FIRST CLAIM FOR RELIEF**

11 **Weber Reservoir**

12 9. Paragraph 9 is an incorporation by reference and requires no response.

13 10. NDOW lacks sufficient information to admit or deny the first three
14 sentences of paragraph 10 of the Second Amended Complaint, and on that basis denies
15 them. The remaining allegations of paragraph 10 consist of legal conclusions that do not
16 require a response. To the extent a response is required, NDOW denies them.

17 11. NDOW lacks sufficient information to admit or deny the factual allegations
18 contained in paragraph 11 of the Second Amended Counterclaim, and on that basis,
19 denies them.

20 12. NDOW lacks sufficient information to admit or deny the factual allegations
21 contained in paragraph 12 of the Second Amended Counterclaim, and on that basis,
22 denies them.

23 **SECOND CLAIM FOR RELIEF**

24 **Lands Restored and Added to Walker River Reservation**

25 13. Paragraph 13 is an incorporation by reference and requires no response.

26 14. The allegations in paragraph 14 of the Second Amended Counterclaim
27 consist of legal conclusions that do not require a response. To the extent a response is
28 required, NDOW denies them.

1 15. The allegations in paragraph 15 of the Second Amended Counterclaim
2 consist of legal conclusions that do not require a response. To the extent a response is
3 required, NDOW denies them.

4 16. NDOW denies the allegations of Paragraph 16.

5 **THIRD CLAIM FOR RELIEF**

6 **Groundwater for All Lands Within the Walker River Reservation**

7 17. Paragraph 17 is an incorporation by reference and requires no response.

8 18. The allegations in paragraph 18 of the Second Amended Counterclaim
9 consist of legal conclusions that do not require a response. To the extent a response is
10 required, NDOW denies them.

11 19. NDOW lacks sufficient information to admit or deny the allegations set forth
12 in paragraph 19 of the Second Amended Counterclaim, and on that basis denies them.

13 20. The allegations contained in paragraph 20 of the Second Amended
14 Counterclaim consist of legal conclusions that do not require a response. To the extent a
15 response is required, NDOW denies them.

16 **AFFIRMATIVE DEFENSES**

17 **First Affirmative Defense**

18 The Second Amended Counterclaim and each and every Claim for Relief stated
19 therein fails to state a claim upon which relief may be granted.

20 **Second Affirmative Defense**

21 The Second Amended Counterclaim and each and every claim for relief stated
22 therein is, by reason of the Decree, barred by the doctrines of claim preclusion, issue
23 preclusion and/or other principles of finality as set forth in *Nevada v. United States*, 463
24 U.S. 110 (1983) and in *Arizona v. California*, 460 U.S. 605 (1983).

25 **Third Affirmative Defense**

26 “General Principles of finality and repose” that apply to water rights
27 decrees, *Arizona v. California*, 460 U.S. 605, 619 (1983), preclude Paragraph XIV of
28 the Degree from being construed as authorizing the modification of the Decree

1 to recognize additional reserved water rights for the Tribe that were not recognized and
2 established in the Decree.

3 **Fourth Affirmative Defense**

4 The Second Amended Counterclaim and each and every claim for relief stated
5 therein is barred by the doctrine of laches.

6 **Fifth Affirmative Defense**

7 The Second Amended Counterclaim and each and every claim for relief stated
8 therein is barred by the doctrine of estoppel.

9 **Sixth Affirmative Defense**

10 Through commencement and resolution of claims against the United States by the
11 Walker River Paiute Tribe, the Second Amended Counterclaim and each and every claim
12 for relief stated therein have been waived, and are therefore extinguished.

13 **Seventh Affirmative Defense**

14 A federal reserved water right exists only if “necessary” to fulfill the *primary*
15 purposes – as opposed to the *secondary* purposes – of the federal reserved lands, *United*
16 *States v. New Mexico*, 438 U.S. 696, 700–702 (1978), and only to the extent necessary to
17 meet the “minimal need” of the federal reservation, “no more.” *Cappaert v. United States*,
18 426 U.S. 200, 141 (1976). The United States has failed to allege or show that the water
19 granted to the United States in the Walker River Decree is insufficient to meet the
20 primary purposes for which the lands were added to the Walker River Indian
21 Reservation, and that the additional water from any source is “necessary” to fulfill the
22 primary purposes of such added lands. Thus, the United States does not have a reserved
23 right to additional water for the lands that have been added to the reservation.

24 **Eighth Affirmative Defense**

25 Under the implied reservation of water doctrine, the United States may not reserve
26 water from a water source that is not within the lands which are being reserved. To the
27 extent that the Second Amended Counterclaim and any claim for relief therein seeks
28 ...

1 water from a source for lands which did not include that water source at the time of
2 reservation, no such claim can be made.

3 **Ninth Affirmative Defense**

4 The primary purpose of adding lands to the Walker River Indian Reservation
5 from 1918 to 1972 was for purposes of dry land grazing, which requires no water for
6 irrigation and only sufficient water to water livestock which can be reasonably grazed on
7 such lands.

8 **Tenth Affirmative Defense**

9 The implied reservation of water rights doctrine does not apply to conservation
10 storage of water for any purpose, including carryover and conservation.

11 **Eleventh Affirmative Defense**

12 The implied reservation of water rights doctrine does not apply to groundwater.

13 **Twelfth Affirmative Defense**

14 If the implied reservation of water rights doctrine applies to groundwater, it does
15 so only in circumstances where it is established that there is insufficient surface water to
16 otherwise satisfy the claimed reserved water right. The water right provided for the
17 Walker River Indian Reservation by the Decree is sufficient to accomplish the purposes
18 for which lands were added to the reservation.

19 **Thirteenth Affirmative Defense**

20 To the extent that this Court determines that any addition of land to the Walker
21 River Indian Reservation resulted in the reservation of water, the use of that water
22 must be restricted to the use impliedly contemplated at the time the land was
23 added to the Reservation, and any change to that use is subject to the provisions
24 of Paragraph X of the Decree and to the Administrative Rules and Regulations
25 Regarding Change of Point of Diversion, Manner of Use or Place of Use of Water
26 of the Walker River and Its Tributaries.

27 ...

28 ...

Fourteenth Affirmative Defense

NDOW reserves the right to amend this answer as additional affirmative defenses are discovered.

WHEREFORE, the Nevada Department of Wildlife prays for judgment against the United States as follows:

1. That the Second Amended Counterclaim be dismissed;
2. For its costs of suit allowed by law; and
3. For such other and further relief as the Court deems just and proper.

DATED this 1st day of August, 2019.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 1st day of August, 2019, I electronically filed the foregoing NEVADA DEPARTMENT OF WILDLIFE's, ANSWER TO AMENDED COMPLAINT, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties of record

/s/ Sandra Geyer